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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

RODOLFO GUZMAN,

Defendant and Appellant.

G055810

(Super. Ct. No. 97WF1387)

O P I N I O N

Appeal from a postjudgment order of the Superior Court of Orange County,
Cheri T. Pham, Judge. Affirmed.

Robert L.S. Angres, under appointment by the Court of Appeal, for
Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant
Attorney General, Julie L. Garland, Assistant Attorney General, Robin Urbanski and
Kristen Kinnaird Chenelia, Deputy Attorneys General, for Plaintiff and Respondent.

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In 1997, defendant Rodolfo Guzman pled guilty to possession of marijuana for sale (Health & Saf. Code, § 11359), possession of methamphetamine for sale (Health & Saf. Code, § 11378), and sale or transportation of methamphetamine (Health & Saf. Code, § 11379, subd. (a)). The trial court placed Guzman on probation for three years.

In August 2017, Guzman filed a motion to vacate his convictions because the trial court failed to provide mandatory immigration-related advisements (Penal Code section 1016.5; all further statutory references are to the Penal Code, unless other stated), and his trial attorney failed to advise him of the immigration consequences of entering a guilty which damaged his ability to meaningfully understand the actual or potential immigration consequences of a guilty plea (§ 1473.7, subdivision (a).) The trial court denied the motion.

Guzman contends the trial court abused its discretion in denying his motion to vacate under section 1016.5 because the record contains no evidence that the sentencing court (which accepted the guilty plea) conducted an inquiry to satisfy itself that Guzman understood the consequences of his plea as a noncitizen. The plea form demonstrates the sentencing court substantially complied with section 1016.5 and therefore Guzman was not entitled to relief. We also reject Guzman's contention the trial court erred in denying his motion to vacate per section 1473.7. The plea form shows Guzman was advised about immigration consequences of pleading guilty. Moreover, even if we assume Guzman received a deficient advisement, he failed to show he would have not entered a guilty plea had he been properly advised. Accordingly, we affirm the trial court's order denying Guzman's motion to vacate his convictions.

I

FACTUAL AND PROCEDURAL BACKGROUND

In his motion to vacate his three drug convictions, Guzman claimed (1) the trial court failed to provide the immigration-related advisements mandated by section

1016.5, and (2) his trial attorney provided constitutionally ineffective assistance because he informed Guzman that he would not be deported as a result of entering a guilty plea. According to Guzman, he would not have pled guilty had he known his plea would result in immigration consequences.

In a supporting declaration, Guzman asserted that “avoiding deportation was always my biggest concern” and that his lawyer told him that he would not be deported based on his guilty plea. Guzman further asserted that “had I been correctly advised that I would be subject to deportation proceedings and prevent[ed] . . . from obtaining lawful residency, I would have requested an attorney to assist me in negotiating a safer disposition. If an immigration-safe disposition was not possible, I would have demanded to go to trial.”

The motion to vacate attached copies of the plea form and the relevant minute order. On the plea form, Guzman initialed the box next to the statement, “I understand that if I am not a citizen of the United States the conviction for the offense charged may have the consequence of deportation, exclusion from admission to the United States, or denial of naturalization pursuant to the laws of the United States.” He also signed under and initialed the box next to the statement, “I declare under penalty of perjury that I have read, understood, and personally initialed each item above and discussed them with my attorney. . . .” His attorney signed under the following statement: “I am attorney of record and I have explained each of the above rights to the defendant.” The deputy district attorney did not sign the form. In the minute order, the box reflecting that the court advised Guzman of the “conseq[ui]ences of [the guilty] plea if not a citizen” was not checked. However, the attached “Certified Plea Minute Order” reflected that the court found Guzman understood “The nature of the charge(s) and the consequences of the plea.”

Guzman did not attach a declaration from his former trial counsel. But he attached a declaration from his current attorney, Cole Williams, who stated that he

contacted Guzman's former lawyer. According to Williams, Guzman's former lawyer informed him that "he does not have any independent recollection of Mr. Guzman's case." Williams also stated that he could not locate any notes or a reporter's transcript of the plea hearing.

Following a hearing, the trial court denied Guzman's motion to vacate his convictions and explained its reasoning in a written ruling. The court determined that the judge who accepted Guzman's guilty plea substantially complied with section 1016.5 because Guzman's initialing and signing of the plea form indicated that he had received the required immigration-related advisements.

The trial court also determined Guzman was not entitled to relief under section 1473.7. It found that Guzman failed to prove his former attorney was constitutionally ineffective. The court found the record contradicted Guzman's assertion that his former attorney misadvised Guzman that he would not be deported if he pleaded guilty. In addition, the court determined that Guzman could not show prejudice because "[n]othing in the available record indicates that [Guzman] was concerned about his immigration consequences at the time of the plea." The court concluded Guzman's "primary concern was getting out of custody as soon as possible," based in part on his prompt decision to plead guilty. The court noted, "Petitioner's maximum exposure for his crimes was four years, eight months in state prison. Petitioner received only 120 days in jail and probation."

II

DISCUSSION

A. Motion to Vacate Conviction Under Section 1016.5

Section 1016.5, subdivision (a), provides that "[p]rior to acceptance of a plea of guilty or nolo contendere to any offense punishable as a crime under state law, except offenses designated as infractions under state law, the court shall administer the

following advisement on the record to the defendant: [¶] If you are not a citizen, you are hereby advised that conviction of the offense for which you have been charged may have the consequences of deportation, exclusion from admission to the United States, or denial of naturalization pursuant to the laws of the United States.” “If, after January 1, 1978, the court fails to advise the defendant as required by this section and the defendant shows that conviction of the offense to which defendant pleaded guilty or nolo contendere may have the consequences for the defendant of deportation, exclusion from admission to the United States, or denial of naturalization pursuant to the laws of the United States, the court, on defendant’s motion, shall vacate the judgment and permit the defendant to withdraw the plea of guilty or nolo contendere, and enter a plea of not guilty.” (§ 1016.5, subd. (b).) “To prevail on a motion to vacate under section 1016.5, a defendant must establish that (1) he or she was not properly advised of the immigration consequences as provided by the statute; (2) there exists, at the time of the motion, more than a remote possibility that the conviction will have one or more of the specified adverse immigration consequences; and (3) he or she was prejudiced by the nonadvisement. [Citations.]” (*People v. Totari* (2002) 28 Cal.4th 876, 884.)

Guzman contends the record does not show the sentencing court verbally advised him about the immigration-related consequences of entering the guilty plea. But a verbal advisement is not required. “[A] validly executed waiver form is a proper substitute for verbal admonishment by the trial court. [Citation.]’ [Citations.] The advisement need not be in the exact language of section 1016.5 and can be in writing.” (*People v. Araujo* (2016) 243 Cal.App.4th 759, 762.) Here, the plea form advised Guzman that “the conviction for the offense charged may have the consequence of deportation, exclusion from admission to the United States, or denial of naturalization pursuant to the laws of the United States.” Those advisements track the advisements mandated by section 1016.5.

Guzman contends section 1016.5 requires the sentencing court to “satisfy[y] itself that the defendant understood the advisements and had an opportunity to discuss the consequences with counsel.” (*People v. Ramirez* (1999) 71 Cal.App.4th 519, 522.) We agree, but the record shows the court substantially complied with this requirement. The plea form indicated that Guzman understood and had the opportunity to discuss the advisements with counsel. Specifically, Guzman initialed and signed under the statement, “I declare under penalty of perjury that I have read, understood, and personally initialed each item above and discussed them with my attorney. . . .” His counsel signed under the statement, “I am attorney of record and I have explained each of the above rights to the defendant.” The trial court substantially complied with section 1016.5, as the required advisements were included in the plea form, which Guzman acknowledged reading, understanding, initialing, and signing. Accordingly, Guzman was not entitled to relief under section 1016.5.

B. Motion to Vacate Under Section 1473.7

Section 1473.7, subdivision (a), permits a person no longer imprisoned or restrained to ask the court to vacate a conviction if the conviction “is legally invalid due to prejudicial error damaging the moving party’s ability to meaningfully understand, defend against, or knowingly accept the actual or potential adverse immigration consequences of a plea of guilty or nolo contendere.” (*Id.*, subd. (a)(1).) The court must hold a hearing on the motion, and if the moving party establishes by a preponderance of the evidence he or she is entitled to relief, the court shall grant the motion to vacate the conviction. (*Id.*, subds. (d) & (e)(1).)

Here, Guzman based his entitlement to relief under section 1473.7 on his trial counsel’s purported constitutionally ineffective assistance. This court reviews de novo a trial court’s order denying a section 1473.7 motion based on a claim of ineffective assistance of counsel. (See *People v. Ogunmowo* (2018) 23 Cal.App.5th 67, 76, 79 (*Ogunmowo*); accord, *People v. Tapia* (2018) 26 Cal.App.5th 942, 950; *People v. Olvera*

(2018) 24 Cal.App.5th 1112, 1116-1117 (*Olvera*).) Under this standard, we “accord deference to the trial court’s factual determinations if supported by substantial evidence in the record, but exercise our independent judgment in deciding whether the facts demonstrate trial counsel’s deficient performance and resulting prejudice to the defendant.” (*Ogunmowo, supra*, 23 Cal.App.5th at p. 76.) To prevail on his claim of ineffective assistance, Guzman had to prove “that (1) counsel’s representation fell below an objective standard of reasonableness, as judged by ‘prevailing professional norms’ [citation], and, (2) ‘but for counsel’s unprofessional errors, the result of the proceeding would have been different’ [citations.]; that is, ‘a reasonable probability exists that, but for counsel’s incompetence, he would not have pled guilty and would have insisted, instead, on proceeding to trial’ [citations].” (*Olvera, supra*, 24 Cal.App.5th at pp. 1116-1117.)

Guzman asserted his counsel affirmatively misadvised him that he would not suffer deportation as a result of entering the guilty plea. (See *Ogunmowo, supra*, 23 Cal.App.5th at p. 77 [“Affirmatively misadvising a client that he will not face immigration consequences as a result of a guilty plea in a drug trafficking case—when the law states otherwise—is objectively deficient performance under prevailing professional norms.”].) But the trial court, based on the record, found that the former attorney properly advised Guzman he could face deportation as a result of entering the guilty plea. The court’s credibility determination is amply supported by the plea form. As noted, in the plea form Guzman initialed the box next to the statement, “I understand that if I am not a citizen of the United States the conviction for the offense charged may have the consequence of deportation, exclusion from admission to the United States, or denial of naturalization pursuant to the laws of the United States.” Both Guzman and his former attorney also stated under penalty of perjury that they discussed those immigration consequences.

Moreover, even if Guzman had established his trial counsel's performance was deficient, he also had to establish prejudice. This required Guzman to prove by a preponderance of the evidence that, if properly advised, he would not have agreed to the negotiated disposition. (*People v. Martinez* (2013) 57 Cal.4th 555, 559, 567 (*Martinez*).) Courts determine prejudice on a case-by-case basis in light of all of the circumstances. (*Lee v. United States* (2017) __U.S. __, [137 S.Ct. 1958, 1966] (*Lee*).) “‘Surmounting *Strickland*’s high bar is never an easy task,’ [citation], and the strong societal interest in finality has ‘special force with respect to convictions based on guilty pleas.’ [Citation.] Courts should not upset a plea solely because of *post hoc* assertions from a defendant about how he would have pleaded but for his attorney’s deficiencies. Judges should instead look to contemporaneous evidence to substantiate a defendant’s expressed preferences.’” (*Lee, supra*, 137 S.Ct. at p. 1967.) “[T]he defendant bears the burden of establishing prejudice” and in the case of a plea bargain, “must provide a declaration or testimony stating that he or she would not have entered into the plea bargain if properly advised. It is up to the trial court to determine whether the defendant’s assertion is credible, and the court may reject an assertion that is not supported by an explanation or other corroborating circumstances.” (*Martinez, supra*, 57 Cal.4th at p. 565.)

Here, the trial court found Guzman’s assertion that he would have rejected the negotiated disposition not credible. No contemporaneous or corroborating evidence was presented that in 1997, Guzman would have not pled guilty if he had been advised of the immigration consequences of his plea. Rather, the record shows Guzman was eager to be released from custody and willing to enter a guilty plea with immigration consequences, as he signed a form acknowledging his guilty plea may have immigration consequences. Accordingly, Guzman has not established his trial counsel’s allegedly deficient performance prejudiced him. In sum, the trial court did not err in denying defendant’s section 1473.7 motion to vacate his 1997 drug convictions.

III

DISPOSITION

The order denying Guzman's motion to vacate is affirmed.

ARONSON, ACTING P. J.

WE CONCUR:

FYBEL, J.

GOETHALS, J.